

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	EB-02-PO-136
)	
Sutro Corporation)	NAL/Acct. No. 200232920001
Payette, Idaho)	
)	FRN 0007562150

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 2004

Released: August 5, 2004

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we deny the November 12, 2003 Application for Review filed by Sutro Corporation c/o John H. Runkle (“*Sutro*”), of the October 14, 2003 *Forfeiture Order*¹ issued by the Enforcement Bureau (“*Bureau*”). In that *Forfeiture Order*, the Bureau found Sutro liable for a monetary forfeiture in the amount of two thousand four hundred dollars (\$2,400) for repeated violation of Section 17.4(a) of the Commission’s Rules (“*Rules*”)² for failing to register its antenna structure located in Payette, Idaho.

II. BACKGROUND

2. On July 31, 2002, the Commission’s Portland, Oregon, Resident Agent Office (“*Portland Office*”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in the amount of three thousand dollars (\$3,000) to Sutro for the above-referenced violation.³ Specifically, the Portland Office found that contrary to rules adopted by the Commission in 1995 regarding tower registration,⁴ and a subsequent *Public Notice* regarding the same,⁵ on May 23, 2002 and July 30, 2002, the 405 foot tower owned by Sutro and located at 44° 03’ 44” North Latitude and 116° 54’ 22” West Longitude in Payette, Idaho was not registered with the Commission in apparent willful and repeated violation of Section 17.4(a).⁶

¹ *Sutro Corporation*, 18 FCC Rcd 20529 (Enf. Bur. 2003) (“*Forfeiture Order*”).

² 47 C.F.R. § 17.4(a) (required the owners of existing antenna structures that were assigned painting or lighting requirements before July 1, 1996, to register those antenna structures no later than July 1, 1998).

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232920001 (Enf. Bur., Portland Office, released July 31, 2002) (“*NAL*”).

⁴ *Streamlining the Commission’s Antenna Structure Clearance Procedures and Revision of Part 17 of the Commission’s Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, 11 FCC Rcd 4272 (1995).

⁵ *Public Notice*, “No-Tolerance Policy Adopted for Unregistered Antenna Structures,” 1999 WL 10060 (WTB, released January 13, 1999).

⁶ On June 11, 2002, an Agent from the Portland Office advised Mr. Runkle that the tower must be registered, and a subsequent search on July 30, 2002, of the Commission’s antenna structure registration records revealed that the tower remained unregistered.

3. In its response to the *NAL*, Sutro admitted that the Payette tower was unregistered until August 27, 2002.⁷ By way of explanation, Sutro averred that it made several attempts to register the Payette tower by filing a “FCC Application for Antenna Structure Registration” (“ASR application”)⁸ for the Payette tower on June 26, 1998, January 28, 2000, August 8, 2002, and August 20, 2002.⁹ Sutro sought mitigation of the forfeiture based on its good faith efforts to register the structure and its claim of a history of overall compliance. Finally, in its Response, Sutro, citing to *C.W.H. Broadcasting*¹⁰ requested a forfeiture reduction from \$2,400 to \$500.¹¹

4. On October 14, 2003, the Bureau released a *Forfeiture Order* finding Sutro liable for a monetary forfeiture in the amount of \$2,400 for its failure to register its antenna structure in repeated violation of the Section 17.4(a) of the Rules.¹² In the *Forfeiture Order*, the Bureau noted that Sutro’s first ASR application, was *untimely* filed because the filing window for ASR applications for existing antenna structures in Idaho closed on February 28, 1998.¹³ The Bureau noted that on August 3, 1998, the Commission staff dismissed Sutro’s first ASR application without prejudice, because Sutro provided coordinates that did not match those submitted by a Federal Aviation Administration (“FAA”) clearance study for the Payette tower.¹⁴ In the *Dismissal Letter*, Sutro was instructed to check the accuracy of its tower coordinates and submit to the FAA a new Form 7460-1 in order to obtain a new clearance with the correct coordinates, and to file with the Commission a new ASR application within 90 days (by November 1, 1998).¹⁵ Sutro filed a revised FAA form almost three months after the 90 day period,¹⁶ and its second ASR application nearly fifteen months after the 90 day period.

5. The Bureau *Forfeiture Order* states that Sutro’s second ASR application was returned without prejudice by the Commission staff on February 8, 2000, because it was submitted on an outdated form.¹⁷ The Bureau noted that the FAA issued a new clearance concerning the Payette tower on February 28, 2000.¹⁸ The Bureau also noted that Sutro filed its third ASR application two and a half years after the

⁷ Sutro Corporation, c/o John H. Runkle, *Response to Notice of Apparent Liability for Forfeiture* at 3 (Aug. 30, 2002) (“Response”).

⁸ See FCC Form 854, “FCC Application for Antenna Structure Registration”.

⁹ Sutro successfully registered its tower when its fourth ASR application was granted by the Commission on August 27, 2002. See Response at and 3.

¹⁰ *C.W.H. Broadcasting, Inc.*, 17 FCC Rcd 14324 (Enf. Bur. 2002) (forfeiture reduced from \$3,500 to \$500).

¹¹ Response at 4.

¹² The Bureau only determined that Sutro’s violations were repeated, it therefore, did not deem it necessary to determine whether they were also willful. See *Koke, Inc.*, 23 FCC 2d 191 (1970); see also, 47 U.S.C. § 503(b).

¹³ *Forfeiture Order*, 18 FCC Rcd at 20532 citing *Streamlining the Commission’s Antenna Structure Clearance Procedure*, 11 FCC Rcd at 4302 (1995).

¹⁴ See Letter from Information Processing Branch, Federal Communications Commission to John Runkle, Sutro Corporation (Aug 3, 1998) (“*Dismissal Letter*”); see also Response at 2.

¹⁵ *Dismissal Letter* at 1.

¹⁶ Sutro filed FAA Form 7460-1 on February 24, 1999. See Response at 2.

¹⁷ See Notice of Immediate Application Dismissal letter from Federal Communications Commission to Sutro Corporation (Feb. 8, 2000) (all manual ASR application submissions made after June 24, 1999, must be made on FCC Form 854 (June 1999 edition)).

¹⁸ See Application for Review at 2.

dismissal of its second ASR application, and almost two months after Sutro was advised of the violation by the Portland Office.¹⁹

6. In examining Sutro's request for mitigation, the Bureau found Sutro's explanation to be "completely inadequate because of the extreme length of the delay in registering the tower, and because, as explained in the August 3, 1998 *Dismissal Letter*, Sutro did not need to wait for a new FAA clearance before filing its registration application."²⁰ The Bureau found that the lengthy filing delays concerning Sutro's second and third ASR applications evidenced a lack of diligence and that its attempts to register its tower did not mitigate the violation.²¹ In addition, the Bureau determined that Sutro's subsequent correction of the tower violation after being notified by Commission staff did not warrant mitigation, citing *Seawest Yacht Brokers* for the proposition that "corrective action taken to come in compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations."²²

7. The Bureau distinguished *C.W.H. Broadcasting*, finding it to be inapposite as the reduction of the forfeiture to \$500 in that case "was primarily based on financial hardship, which is not present in this case."²³ Finally, the Bureau did reduce the forfeiture amount from \$3,000 to \$2,400 based on Sutro's history of overall compliance.²⁴

8. In its Application for Review, Sutro reiterates the arguments previously rejected by the Bureau's *Forfeiture Order*. Sutro also again argues for a forfeiture amount of no more than \$500 (reduced from \$2,400), reiterating an alleged good faith effort to register the subject tower, and again citing to *C.W.H. Broadcasting*, where a forfeiture amount was reduced to \$500. Sutro maintains that although the Bureau's *C.W.H. Broadcasting Forfeiture Order* reduced the \$20,000 proposed forfeiture to \$3,500 based on an inability to pay,²⁵ there was no indication in *C.W.H. Broadcasting*, in which the Bureau granted in part C.W.H. Broadcasting's Petition for Reconsideration²⁶ of the *C.W.H. Broadcasting Forfeiture Order*, that the forfeiture was further reduced from \$3,500 to \$500 based on an inability to pay.²⁷

III. DISCUSSION

9. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934 as amended ("Act"),²⁸ Section 1.80 of the Rules,²⁹ and *The Commission's*

¹⁹ Sutro explained that it expected to file its third ASR application after receiving a new FAA clearance but did not learn of the new clearance until it contacted the FAA following the issuance of the *NAL*. See Response at 2.

²⁰ *Forfeiture Order*, 18 FCC Rcd at 20531.

²¹ *Id.*

²² *Forfeiture Order*, 18 FCC Rcd at 20531 citing *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994).

²³ *Forfeiture Order*, 18 FCC Rcd at 20531.

²⁴ *Id.* at 18 FCC Rcd at 20532.

²⁵ See *C.W.H. Broadcasting, Inc.*, 17 FCC Rcd 4548, 4549 (Enf. Bur. 2002) ("*C.W.H. Broadcasting Forfeiture Order*") (\$20,000 proposed forfeiture reduced to \$3,500 based on inability to pay).

²⁶ Letter from Charles W. Holt, owner, C.W.H. Broadcasting, Inc., to David H. Solomon, Chief, Enforcement Bureau (dated Mar. 11, 2002)(Petition for Reconsideration).

²⁷ Application for Review at 4.

²⁸ 47 U.S.C. § 503(b).

²⁹ 47 C.F.R. § 1.80.

*Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines.*³⁰ In examining Sutro's Application for Review, Section 503(b) of the Act requires that we take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and any such other matters as justice may require.³¹

10. Sutro argues, as it did in response to the *NAL*, that its unsuccessful attempts to register the antenna tower should be viewed as good faith efforts, and seeks cancellation or a further reduction of the forfeiture assessed by the Bureau on that basis. In forfeiture proceedings, we have generally provided reductions based on the good faith corrective efforts of a violator when those corrective efforts were taken prior to Commission notification of the violation.³² However, in view of the facts before us, we agree with the Bureau's ruling that the periodic unsuccessful attempts to register the Payette tower do not mitigate the assessed forfeiture for its violation of Section 17.4(a) of the Rules. Consistent with the Bureau's finding, we find that the lengthy delays in Sutro's filing of its second and third ASR applications evince a lack of diligence such that the periodic unsuccessful attempts to register the tower do not rise to the level of good faith efforts to comply that would entitle Sutro to further mitigation of the assessed forfeiture amount.

11. Further, we reiterate that the *C.W.H. Broadcasting* and Sutro cases may be distinguished on the basis that each entity seeks a downward adjustment based on different criteria: *C.W.H. Broadcasting* successfully based its claim on an inability to pay, while Sutro unsuccessfully bases its claim on an entirely different issue—a good faith effort to adhere to the Rules. Moreover, *C.W.H. Broadcasting* submitted sufficient evidence in its response to the *NAL*³³ to establish an inability to pay, and submitted amplified evidence in its Petition for Reconsideration regarding its financial condition sufficient to warrant a further reduction in the forfeiture amount based on its financial hardship to *C.W.H. Broadcasting*. Sutro, on the other hand, was initially unsuccessful in establishing a good faith attempt to adhere to the Rules, and, in its Application for Review, offered no additional evidence of good faith which would warrant a further reduction of the forfeiture amount. Accordingly, we affirm the Bureau's finding that the factors present in *C.W.H. Broadcasting* are not present here, and conclude that *C.W.H. Broadcasting* does not support a further reduction in the forfeiture amount.

12. We have examined Sutro's Application for Review and are not persuaded to reduce the forfeiture amount. Accordingly, we affirm the Bureau's *Forfeiture Order* finding Sutro Corporation liable for a forfeiture amount of \$2,400.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to 1.115(a) and 1.115(g) of the Rules,³⁴ the Sutro Corporation Application for Review of the Enforcement Bureau *Forfeiture Order* for NAL No. 200232920001 **IS DENIED**.

Payment of the \$2,400 forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified,

³⁰ 12 FCC Rcd. 17087 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

³¹ 47 U.S.C. § 503(b)(2)(D).

³² See Note to Section 1.80(b)(4) of the Rules, 47 C.F.R. § 1.80(b)(4). "Section II. Adjustment Criteria for Section 503 Forfeitures," "Downward Adjustment Criteria," "Good faith or voluntary disclosure"; see also *Radio One Licenses, Inc.*, 18 FCC Rcd 15964, 15965 (2003); *recon. denied*, 18 FCC Rcd 25481 (2003).

³³ *C.W.H. Broadcasting, Inc.*, NAL/Acct. No. 200232620001 (Enf. Bur., New Orleans, released Oct. 24, 2001).

³⁴ 47 C.F.R., §§ 1.115(a) and (g).

the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³⁵ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference the NAL/Acct. No. referenced in the caption. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.

14. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Sutro Corporation., c/o John H. Runkle, P.O. Box 1826, Boise, Idaho 83701, and to its counsel, Matthew H. McCormick, Esq., Reddy, Begley & McCormick, LLP, 2175 K Street, N.W., Suite 350, Washington, D.C. 20037-1845.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁵ 47 U.S.C. § 504(a).